BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEPHEN R. NEEL, Claimant, v. WESTERN CONSTRUCTION, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE CO., Surety, Defendants.	)	**IC 2005-011115** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: June 8, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on September 29, 2006. Brett Fox of Boise represented Claimant. R. Daniel Bowen of Boise represented Defendants. The parties submitted oral and documentary evidence. The record was held open for taking post-hearing depositions. On October 26, 2006, Claimant terminated his relationship with Mr. Fox and Darin Monroe of Boise filed a notice of appearance on Claimant's behalf. Ultimately, no post-hearing depositions were taken. The parties submitted post-hearing briefs, and the matter came under advisement on February 27, 2007, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant suffered accidents and injuries on September 15, 2005, as alleged in his Complaint;

2. Whether Claimant's need for medical care is due to accidents and injuries suffered while in the employ of the Employer on September 15, 2005;

3. Whether Claimant is entitled to total temporary disability benefits; and,

4. Whether the medical expenses Claimant has incurred for treatment of his low back are compensable under Idaho Code § 72-432.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts that on September 14, 2005, while loosening compacted soil around a water pipe, he jumped up and down on his shovel and suffered an acute onset of a cramp-like pain in his left leg and mild stiffness in his low back.[1] Claimant initially believed that the leg and back pain was merely the type of minor transient pain that often accompanied heavy manual labor. When Claimant's pain increased rather than abated, he sought medical care, and was eventually diagnosed with herniated discs in his lumbar spine. Claimant was taken off work, and subsequently underwent two low back surgeries. Claimant asserts that his disc injuries and need for surgery were the direct result of his work-related injury on September 14, 2005. Claimant seeks compensation for the medical care necessitated by his work injury, and temporary total disability benefits for the period he was off work.

Defendants assert that the etiology of Claimant's herniated lumbar discs is unknown. Claimant did not tell Employer about the alleged September 14, 2005 accident or his injuries, nor did he report the work-related nature of his injuries to the medical professionals from whom he

[1] The date of injury listed on the Complaint is September 15, 2005. Claimant's testimony actually placed the date of injury on Wednesday, September 14.

first sought care. Further, Claimant denied knowledge of any trauma or injurious event that could have caused his herniated lumbar discs. Because Claimant has failed to establish that he sustained an injury from an accident related to his employment, Claimant is not entitled to either medical or income benefits under workers' compensation provisions.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Dale "Skip" Darrow, and Carole Carr, taken at hearing; and

2. Joint exhibits 1 through 13, admitted at hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 40 years of age. He lived in Payette, Idaho, with his wife.

2. Claimant has a tenth-grade education. He has always worked as a laborer. In the late 1990s, Claimant started working for large construction companies that did a lot of road construction, and since that time his employment has primarily been in road construction—in particular that portion of the construction project that involves installation of pipes, culverts and gabions. Claimant's work is typically seasonal with periods of lay-off in the winter months. Claimant worked for a number of different contractors, depending upon who had the road-building contracts in any given year.

3. In January 2001, Claimant sustained a cervical injury while working for a contractor on a hospital project in Ontario, Oregon. Claimant had a two-level surgical fusion,

with hardware, and was off work for over a year. Claimant returned to his previous occupation doing heavy labor on road construction projects in April 2002. Claimant's cervical fusion caused him some stiffness and loss of range of motion during the winter months, but did not limit his ability to do heavy labor.

4. In July 2005, Claimant went to work for Employer. Employer was a union shop and Claimant had long sought to be hired by Employer. At the time that Claimant started working for Employer, the company was working on a road construction project on Pole Line Road in Twin Falls. Claimant worked on the Twin Falls project, mainly doing pipe work, putting in fifty hours or more per week.

5. Employer had a safety program that included weekly safety meetings for all employees. In addition, each day's time card required a certification not only that the employee had not been injured that day, but that the employee had not observed anyone else being injured that day.

6. After working for Employer for a couple of weeks, Claimant cut his hand on a piece of pipe. He taped it with duct tape and kept on working. A supervisor noticed the injury a few hours later, and directed Claimant to seek medical care, including a tetanus shot if he hadn't had one recently. Claimant had stitches in the hand and received a tetanus shot. Claimant's medical costs were evidently picked up by workers' compensation, and it does not appear that Claimant suffered any time loss as a result of this accident and injury.

7. At about 9:30 a.m. on September 14, 2005, Claimant was using a shovel to break up compacted soil on top of a pipe so that the backhoe could remove it. Claimant was jumping on the shovel when he felt a pain like a charley horse in his left leg. Claimant testified that he might also have felt a little bit of stiffness in his low back, but thought nothing of it because "as a

laborer that's – that's normal." Tr., p. 9. Claimant described the pain in his left leg as "like a Charlie horse, just like stiffening and tightening. It would – oh, it would be weak for a couple – you know, it would be weak and, then, it would go to Charlie horses . . ." *Id.*, at p. 10.

8. Claimant did not tell anyone on the job about the leg pain, explaining, "Well, I didn't want to jeopardize my job with Western and on the firsthand, a Charlie horse ain't really – I figured a Charlie horse ain't really anything to complain about." *Id.*

9. Claimant continued to work the rest of the day, taking frequent breaks. The pain in his left leg did not abate. At the end of the day, Claimant used heat and ice and a topical analgesic to treat the leg pain.

10. Claimant's leg pain did not improve with the heat, ice, and rest. On Thursday, September 15, Claimant and a co-worker, Johnny, were assigned to work at the scalehouse at the gravel pit where the contractor was getting gravel for the Twin Falls project. The pit was some forty to fifty miles south of Twin Falls. Claimant told Johnny about the cramp-like pain in his left leg, and Johnny opined that Claimant might want to see a chiropractor if the leg didn't get better.

11. Working at the scalehouse was much less physical than the pipe work that Claimant had been doing at the project site. However, the first day that Claimant worked at the scalehouse, the only access and egress to the scalehouse was a flimsy chair used as a single step in the four-foot span between the ground and the scalehouse floor. Claimant occasionally had to get out of the scalehouse to talk to a driver, and found that getting in and out of the scalehouse seemed to aggravate his leg pain. The access problem was eliminated later that day when the project superintendent ordered a load of gravel be used to build steps to the scalehouse. Claimant worked at the scalehouse the remainder of that week (September 15 and 16).

12. The weekend of September 17 and 18, Claimant went home to Payette. He continued to have pain in his left leg. Claimant continued treating the pain with ice and heat and topical analgesics, and continued to try and stretch the leg and work out the cramp.

13. Claimant returned to Twin Falls and work on Monday, September 19. He continued to be assigned to the scalehouse, and he still had the cramp-like pain in his leg. When Claimant awoke on Tuesday, September 20, the pain in his leg was much worse than it had been. On Wednesday, the pain was even more severe. Claimant worked at the scalehouse both days. When Claimant saw his supervisor on Wednesday, September 21, he told him that he had charley horses in his left leg and that he needed to take Friday off to see a doctor. The two men did not discuss the cause of Claimant's leg pain at that time. Claimant worked Thursday, September 22 at the scalehouse, and put in four and a half hours on Friday, September 23 before leaving work and heading home to Payette.

MEDICAL CARE

14. Claimant sought medical care at the Fruitland clinic that is part of Holy Rosary Medical Center (HRMC) in Ontario, Oregon. He was seen by a physician's assistant (PA). Chart notes from the visit indicate that Claimant "[complained of left] leg pain 9/10 x 3 days. Woke up [with] leg pain, none [sic] known injury." Exhibit 9, p. 119. On exam, the leg appeared normal with no atrophy or strength deficits or range of motion deficits in the hip or knee. The PA noted that Claimant was hesitant to fully extend the left leg with increased pain in his quadriceps. The PA prescribed Vicodin and Flexeril and told Claimant to rest, and limit his weight-bearing activities. Claimant provided his union health insurance information as the primary payor.

15. On Saturday, September 24, Claimant was still having severe leg pain, so he went to the ER at HRMC. The chart note identifies the chief complaint as "[l]ow back pain and left leg pain" but goes on to state:

> The pain is really mostly in the left leg of this patient. It is clearly worsened when he walks but he does have times where the pain is bad even when lying down. The pain tends to be from the upper thigh down to the knee and a little bit below the knee. It is really difficult for this patient to describe whether the pain is worsened with movement particularly. It is worsened after walking but not particularly with movement. It is difficult for me to establish that he has muscular pain. He denied any trauma to the leg. It had been bothering him for about 4 days.

Exhibit 10, p. 124. On exam, the ER physician observed that there was no focal tenderness in the left leg and no tenderness or instability in the knee or hip. He did observe tenderness in the left lateral low back. X-rays taken of the left femur were unremarkable. Ultimately, the ER physician noted:

> We did discuss the possibility of this being radiculopathy associated to a disc herniation. An MRI would be prudent if symptoms persist.
>
> IMPRESSION: Acute lumbar radiculopathy.

Id.

16. On Monday, September 26, Claimant saw David Owens, D.C. The chart note indicates that Claimant was complaining of lumbar pain with radiculitis into the left leg. Dr. Owens sent Claimant for x-rays of his lumbar spine, which showed notable degenerative conditions at L3-4 and L4-5. Dr. Owens treated Claimant on September 27, 29, 30, and October 3, 4, and 5. On October 5, Dr. Owens sent Claimant for an MRI, which showed herniated discs at L3-4 and L4-5. On October 11, Dr. Owens referred Claimant to Michael L. Henbest, M.D., a neurological surgeon.

17. Claimant saw Dr. Henbest on October 12. Given that Claimant had had previous cervical surgery with Timothy Johans, M.D., Dr. Henbest referred Claimant back to Dr. Johans. Claimant saw Dr. Johans the same day. Dr. Johans' chart note states:

> [Claimant] is a manual laborer. He is working for [Employer] digging ditches and shoveling. It was September 14 when he had a lot of pain in his back and then by the next morning had the pain all the way down his leg. He had weakness of his left leg by the next morning and the beginning of numbness and tingling from his groin to the knee on the anterior side.

Exhibit 4, p. 34. Dr. Johans diagnosed an acute left L3 radiculopathy due to a large disc herniation, and a right L4-5 disc herniation that was asymptomatic. He recommended immediate surgery.

18. On October 19, Claimant had low back surgery. By the morning of the scheduled surgery, Claimant's right side herniation at L4-5 had become symptomatic. Dr. Johans performed a left L3-4 hemilaminotomy, complete facetectomy and far lateral discectomy as well as a right L4-5 hemilaminotomy and discectomy. After the surgery, Claimant's right-sided symptoms improved dramatically. His left-sided symptoms improved, but he continued to feel some pain and experience some weakness on the left side. On January 6, 2006, Dr. Johans referred Claimant to Nancy Greenwald, M.D., to see if Claimant's symptoms could be improved or controlled.

19. Claimant saw Dr. Greenwald on January 19, 2006. In light of Claimant's on-going L3 nerve root impingement, Dr. Greenwald ordered some additional imaging. She prescribed Neurontin for Claimant's pain, and recommended that Claimant finish up his physical therapy. Dr. Greenwald released Claimant to light duty with limited bending, twisting, and stooping and a fifteen-pound lifting limitation. The imaging showed normal post-operative changes at L3 with no appreciable impingement on the thecal sac or the nerve root.

20. Claimant returned to Dr. Greenwald on February 16. They discussed the imaging, and Dr. Greenwald noted that Claimant had a good result with the L3-4 resection. She could not pinpoint the cause of his continuing left leg pain. She did not recommend any further surgical intervention and advised Claimant that he need not return to Dr. Johans. Claimant had not filled the prescription for Neurontin, but promised to do so. Dr. Greenwald also prescribed Lexapro for Claimant's depression. She imposed a permanent fifty-pound lifting restriction, and told him he could not return to heavy labor. She referred Claimant to Vocational Rehabilitation, and noted that she wanted to see him in two weeks at which time she expected to discharge him. February 16 was Claimant's last documented visit with Dr. Greenwald.

21. On February 27, Claimant started seeing Richard Radnovich, D.O. The record does not disclose how Claimant came to seek treatment from Dr. Radnovich. On his first visit, Dr. Radnovich planned to begin medical management of Claimant's pain symptoms. He provided some new prescriptions and advised Claimant to return in two weeks for follow-up. Claimant returned to Dr. Radnovich on March 13 and March 20. Claimant was not improved. Dr. Radnovich suggested that Claimant see Howard A. King, M.D.

22. Claimant saw Dr. King on March 31, 2006. Dr. King ordered x-rays and an MRI and reviewed them the same day. The imaging showed advanced degenerative changes at L2-3, L3-4, L4-5 and L5-S1. In addition, Claimant had developed a focal scoliosis at L3 where his facet joint had been removed in the first lumbar surgery. Dr. King was "not particularly wild about another surgical procedure" (Ex. 6, p. 69), and encouraged Claimant to have Dr. Radnovich try a lumbar epidural steroid injection (LESI).

23. On April 3, Dr. Radnovich performed an LESI. On April 19, Claimant returned to Dr. Radnovich, and reported no improvement with the LESI. Dr. Radnovich thought that a

fluroscopic LESI might be more efficacious, and on May 11 a colleague of Dr. King performed a fluoroscopic LESI, and Claimant experienced immediate relief. The relief was short-lived, however, and when Claimant returned to Dr. King on May 17, he reported that his symptoms had returned. Dr. King opined that at that point, perhaps surgical intervention was a reasonable option. Because Claimant had signs of depression, Dr. King sent him to see Michael McClay, Ph.D., for pre-surgical psychological evaluation. Dr. McClay's evaluation is not part of the record of these proceedings. Claimant continued treating with Dr. Radnovich during the period leading up to his second lumbar surgery.

24. On June 19, Dr. King performed a repeat laminectomy at L3-4, L4-5, an interbody fusion of L3-4 and a fusion from L3 to L5 using an autogenous bone graft from Claimant's iliac crest.

25. Post-operative medical records are limited to one visit with Dr. King on July 6, and one visit with Dr. Radnovich on July 13. Dr. King reported Claimant recovery was on a satisfactory course. Dr. Radnovich noted that Claimant was not using the medications that had been prescribed because he could not afford to purchase them. Dr. Radnovich gave Claimant samples and ordered him to return for follow-up in two weeks, and to continue post-operative follow-up with Dr. King.

CHRONOLOGY OF WORKERS' COMPENSATION CLAIM

Commission Form 1

26. On October 5, 2005, Claimant filled out a First Report of Injury or Illness (Commission Form 1). This is the form 1 that is on file with the Commission; it also appears as Ex. 7, p. 98 of the hearing record. Commission Form 1 was prepared at Dr. Owens' office by Claimant with help from Dr. Owens' receptionist. Commission Form 1 lists the date of injury as

September 14 or 15, 2005, and includes the following *verbatim* explanation of how the injury occurred:

> Shoveling in trench getting dirt away from pipe so we can poor concreat around the pipe. Also up & down in scalehouse. There was a 4 foot drop to scalehouse & ground using a chair for steps. No steps. See attached.

First Report of Injury or Illness, Commission Legal File, Filed October 17, 2005. Attached to Commission Form 1 was Claimant's handwritten statement, also dated October 5, 2005, and reproduced *verbatim:*

> I Steve Neel woke up on the morning of the 20th of September and could not put no wait on my left leg. I did not do anything in the night to cause my leg to do what it was doing.

Exhibit 2, p. 3. Employer received Commission Form 1 and Exhibit 2, p. 3, on October 13 via facsimile from Dr. Owens' office. Employer forwarded Commission Form 1 to Carole Carr, the adjuster for Pinnacle Risk Management who handles Employer's claims, on October 14. Exhibit 2, p.3, which originally accompanied Commission Form 1, was not forwarded to Ms. Carr by Employer. Commission Form 1, together with Exhibit 2, p. 3, was filed at the Commission on October 17.

Employer's Form 1

27. On October 13, at Dr. Owens' request, Employer faxed Employer's First Notice of Injury or Illness to Dr. Owens' office (Employer's Form 1). Claimant filled out Employer's Form 1 with the assistance of Dr. Owens' receptionist. The date of injury is listed as "9/14 or 15/05." Exhibit 1, p. 1. The description of the activity being engaged in at the time of injury is terse: "Shoveling in trench, [illegible] scalehouse." As to how the accident occurred, the form states, "see attach page." *Id.* Employer's Form 1 is stamped "Received," October 18, 2005 by Pinnacle Risk Management Services. It contains Claimant's signature, but not the date. Reliable

testimony establishes the date it was prepared and signed as October 13, 2005. Employer's Form 1 provided little space for an explanation of how the injury occurred, so once again, Claimant at the suggestion of the receptionist, attached a handwritten note that included additional explanation. The handwritten statement is reproduced *verbatim* as follows:

> Shoveling in trench getting dirt away from pipe so we can poor concreat around the pipe. Also up & down in scalehouse. There was a 4 foot drop to scalehouse to the ground using a flimsy chair. There was no steps to go in and out of scalehouse unsafe that was were I started leg pain.
>
> Skip Darrow fill free to call me at home if you need more info Thank you.

Exhibit 2, p. 2. Employer received its Form 1 and Exhibit 2, p. 2, on the afternoon of October 13. Ms. Carr received Employer's Form 1 on October 18. There is nothing in the record to substantiate that Ms. Carr received Exhibit 2, p. 2, which originally accompanied Employer's Form 1.

28. Ms. Carr contacted Dr. Owens' office seeking additional information at a later date, and received Exhibit 2, p. 3, the note that accompanied Commission Form 1, via facsimile on November 4.

Supervisor's Report

29. Exhibit 2, p. 4, is a handwritten document dated October 14, 2005 and signed by Stan Guntly, Claimant's supervisor. Mr. Guntly's note constitutes the "supervisor's report" that Mr. Darrow requested from Guntly once he learned of Claimant's workers' compensation claim. The note confirms that Claimant first worked at the scalehouse on Thursday, September 15, and notes that when Guntly arrived at the pit that afternoon, he noted that a chair was being used to get into and out of the scalehouse. Guntly immediately order the problem remedied by using a load of gravel to make a safe entrance. Guntly's note also confirms that Claimant worked at the scalehouse every day the week of September 19. For Friday, September 23, Guntly wrote:

> [Claimant] worked 4 ½ hours, said he wanted off early to go to a doctor and have his legs checked out as he was getting Charlie horses and shaking in his legs. No mention of any accident on job.
>
> [Claimant] is a very hard worker and a good, honest person.

Ex. 2, p. 4.

30. Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

INJURY/ACCIDENT

31. The burden of proof in an industrial accident case is on the claimant. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996).

32. An "accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An "injury" is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17).

33. Defendants contend that Claimant has failed to meet his burden of proving that he sustained an injury resulting from an accident that was related to his work. In support of their position, Defendants rely primarily upon the following factors:

- Claimant did not report the accident and injury to his supervisor;
- Initial medical histories that Claimant gave to medical providers fail to mention the accident and injury that form the basis of Claimant's claim; and

- Claimant was not honest with Employer or his medical providers.

Reporting

34. Claimant admits that he did not immediately report his leg pain to his supervisor on September 14 or in the days following. Claimant's explanation is two-fold: First, he thought the leg pain was just a cramp or a charley horse—a minor, transient pain that was not necessarily even associated with an injury. Claimant's explanation is borne out by the medical records. When he first sought medical care on September 23, he told the PA that he was experiencing left leg pain. He told the physician at HRMC the same thing the following day. In fact, while at HRMC on September 24, x-rays were ordered—x-rays only of Claimant's left leg. The medical records from HRMC note that the symptoms appear to be radiculopathic in nature and that an MRI might be in order. Claimant understood at least some of this information, if not its implications, since he did not pursue further diagnostic imaging and instead went to see a chiropractor, Dr. Owens. On October 5, Dr. Owens ordered an MRI, which was done the following day. On October 11, Dr. Owens referred Claimant to Dr. Henbest with the MRI results. It is not clear from the record when Claimant first learned of the MRI results, but certainly he had done so by October 13 when he completed the Commission Form 1 at Dr. Owens' office.

During his testimony, Claimant related how he came to include the hand-written note that was attached to the Commission Form 1. Having identified the date of the accident as September 14 or 15, Dr. Owens' receptionist, Jan, asked him when his leg started to hurt so much that he thought he needed medical attention. Claimant's answer was that when he woke up the morning of September 20, his leg hurt so much that he couldn't bear weight on it. Jan suggested that he add that information to the Commission Form 1 and he did so with a hand-

written attachment. Together, the Commission Form 1 and the attachment describe the original event on September 14, the aggravating activity on September 15, and the day that Claimant realized that the charley horse in his left leg was not going to go away by itself.

35. Employer's Form 1 (Exhibit 1, p. 1) provided virtually no space for a description of the activity engaged in at the time the injury occurred. Claimant's five-word explanation on the form itself was supplemented by an attachment. The language in the attachment is virtually identical to the information contained on the Commission Form 1. Claimant testified that he believed that the information on the two forms and two attachments constituted pretty much everything he knew about his claim at the time he filed it.

36. Claimant's second reason for not reporting his accident or injury right away was his expressed concern that it would look bad to have two workers' compensation claims filed within such a short time span, and when he had been working for Employer for such a short time. Defendants dismiss this explanation out-of-hand, as Claimant could point to no action or statement that would support such a fear. However, as pointed out by this Referee in *Stacey Williams*, IC 2004-512366, filed April 24, 2007, it is not unreasonable for an individual who has always worked in the construction trades to have seen first-hand or experienced employment-related consequences for reporting industrial injuries. It is of little consequence that a claimant's fears have no objective basis as they pertain to a particular employer when a claimant's actions are driven by his or her subjective belief. Claimant testified that he had been trying for a long time to get on with Employer because it was a union shop, was one of the largest road contractors in the state, and often had work available year round. Just a few weeks into his employment, he injured his hand, and it is clear from the record that had it not been for a supervisor seeing duct tape on Claimant's hand, he wouldn't have reported that injury either.

Claimant testified that he believed he was better off using his union insurance to pay for minor medical needs, even if they were work-related. Shovel operators are a dime a dozen, and highly paid heavy labor jobs are limited in number but much in demand.

37. Ultimately, Claimant filed a Commission Form 1 with Employer on October 13, 2005—twenty-nine days after the date of the accident and injury, and within the time limits prescribed by statute. While Claimant may not have complied with Employer's policy regarding the reporting of accidents, such failure is not a basis for denial of benefits.

Medical Records

38. Defendants argue that if Claimant really had been injured on the job on September 14, he would have told the first medical providers about the accident and injury. In particular, they assert that what Claimant told the medical providers was that he woke up with severe pain in his leg on September 20 and didn't know of any injury, and that he never told the providers that the injury was work-related. Defendants' second issue has been discussed in a prior finding, and is proof of nothing.

39. Defendants' interpretation of the September 23 chart note ("[complained of left] leg pain 9/10 x 3 days. Woke up [with] leg pain, none [sic] known injury." Exhibit 9, p. 119) presumes a great deal. Claimant testified that it means exactly what it says—that his *pain* had been nine out of ten since waking on September 20, and that nothing had happened overnight to account for the significant increase in pain. The chart note doesn't tell us the question that prompted the notation, or whether the PA who saw Claimant probed any more deeply into the issue. Claimant is neither well educated nor well spoken; to presume that he possesses the

medical sophistication to *offer* relevant history without expert prompting is a bit of a stretch.[2] Neither does Claimant's previous experience with a cervical injury and radicular symptoms impute a peculiar insight that would allow Claimant to extrapolate that his left leg pain was actually the result of two significant disc herniations.

40. When Claimant visited HRMC on Saturday, September 24, he was still under the impression that he had a charley horse in his leg and he just needed a shot or some medication to make it go away. Claimant's description of his pain (left leg pain in a definite distribution that can't be localized and is not exacerbated with movement, but is made worse by weight-bearing) was consistent with the doctor's findings on exam and with the doctor's diagnosis of radiculopathy. The chart notes denying a known trauma and that the leg had been bothering him for about four days are of limited value, since we have no way of knowing what questions were asked or what conversations transpired between Claimant and the emergency room doctor that led to those particular notes. As discussed previously, a muscle cramp or a charley horse is not necessarily associated with a traumatic injury. Claimant's statement that the leg had been bothering him for about four days was a true and accurate response to any number of questions that might have been asked.

41. When Claimant saw Dr. Owens on Monday, September 26, his presenting complaint was lumbar pain radiating into the left leg. This is the first time that lumbar pain was identified as the predominant issue in the medical records. Claimant clearly understood something of what he had been told by the HRMC doctor on Saturday, although he continued to believe that his problem could be fixed by a couple of visits to a chiropractor. When that turned out not to be the case, Claimant filed the instant claim.

[2] Since muscle cramps and charley horses are commonly experienced by many people without relation to an injury, the chart note referencing no known injury becomes even more ambiguous.

Claimant Was Dishonest

42. Defendants contend that Claimant was not honest with Employer or with those from whom he sought medical treatment because he did not report the accident and injury and because he did not clearly inform his medical providers how his injury occurred. Claimant's supervisor offered an unsolicited testimonial to Claimant's character when he submitted his notes regarding events at work around the time of Claimant's accident. The Referee had the opportunity to observe Claimant both in and out of the hearing room. Claimant appeared to be precisely what he claimed—a forty year old manual laborer with little education, limited verbal and written communication skills, and uncomplicated motives. The Referee does not believe that Claimant has the medical sophistication or the intellectual cunning to invent an accident and injury where none occurred.

Injury/Accident Summary

43. Claimant sustained an injury as a result of an accident while he was performing work for Employer at a job site in Twin Falls. Claimant was able to locate the time and place that the injury occurred, as well as describe precisely what he was doing when the injury occurred. While the details of the mechanism of injury were not fleshed out at the time that Claimant first sought medical care, the medical records are consistent with Claimant's limited understanding of his condition at that time, and remained consistent with Claimant's version of events as matter unfolded. Claimant has met his burden of proving that he sustained an injury as a result of an accident while in the course of his work for Employer.

CAUSATION

44. The burden of proving medical causation in an industrial accident case is also on the claimant.

> The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot,* 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

45. Medical causation was identified as an issue in this proceeding, and a determination on medical causation is a prerequisite to subsidiary issues such as medical care and income benefits. Defendants did not argue the issue of medical causation in their briefing, instead placing all of their eggs in the “no accident, no injury” basket. While the issue of medical causation is not as well developed, there is sufficient evidence in the record to find that Claimant has met his burden of proving that his lumbar herniations are more likely than not the result of his work loosening compacted soil on September 14, 2005. The record contains no evidence of any prior lumbar injury or radicular complaints, though imaging does show that Claimant had significant degenerative changes throughout his entire spinal column. While he might have been a walking herniation waiting to happen, the fact is, it didn’t happen until Claimant was doing Employer’s work on September 14, 2005. No physician who saw or treated

Claimant suggested otherwise. Dr. Johans, who performed the first lumbar surgery, noted in his correspondence to Dr. Owens that it was a straightforward valid claim and he was "stunned" that Claimant's workers' compensation claim was denied. Exhibit 4, p. 45.

46. Defendants argue that the opinions on medical causation are all based on Claimant's self-reported history, and therefore, cannot be any better than the information they were based upon. This argument completely disregards the imaging studies, and Dr. Johan's findings during surgery, all of which were consistent with a recent, acute injury. Additionally, as discussed previously, Claimant was credible, if not articulate. The information he provided his medical providers led fairly quickly to a diagnosis that was consistent with Claimant's consistently reported symptoms and the mechanics of the injury as described by Claimant. Defendants presented no objective evidence that disputes the medical findings of causation, and chose not to even argue the issue in their brief.

MEDICAL CARE

47. Having found that Claimant sustained disc herniations as a result of an accident arising out of and in the course of his employment, Claimant is entitled to medical care as provided by Idaho Code 72-432. Claimant is entitled to payment of or reimbursement for, all of the medical care he received that was related to his disc herniations including diagnostic imaging, surgeries, rehabilitation, medications, and equipment that was reasonably medically necessitated by his injuries.

TTDs

48. Idaho Code § 72-408 provides in pertinent part:

> Income benefits for total and partial disability during the period of recovery . . . shall be paid to the disabled employee subject to deduction on account of waiting period and subject to the maximum and minimum limits set forth in section 72-409, Idaho Code . . .

Claimant's last day of work was September 23, 2005. He is entitled to TTD/TPD benefits at the statutory rate from that date until he was deemed medically stable and released to return to work. Claimant clearly has multiple periods of recovery, given that he has undergone two surgeries. The Referee lacks the specific information necessary to more specifically determine Claimant's right to TTD benefits.

CONCLUSIONS OF LAW

1. Claimant's lumbar injuries were the result of an accident that occurred in the course of his employment on September 14, 2005.

2. Claimant's subsequent need for medical care was the direct result of the September 14, 2005, injury and accident, and is compensable.

3. Claimant is entitled to TTD/TPD benefits as provided by Idaho Code § 72-408.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 4 day of June, 2007.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of June, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DARIN G MONROE
PO BOX 50313
BOISE ID 83705

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

djb _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEPHEN R. NEEL, Claimant, v. WESTERN CONSTRUCTION, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE CO., Surety, Defendants.	)	**IC 2005-011115** **ORDER** Filed: June 8, 2007

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant's lumbar injuries were the result of an accident that occurred in the course of his employment on September 14, 2005.

2. Claimant's subsequent need for medical care was the direct result of the September 14, 2005, injury and accident, and is compensable under Idaho Code § 72-432.

3. Claimant is entitled to TTD/TPD benefits as provided by Idaho Code § 72-408.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 8day of June, 2007.

INDUSTRIAL COMMISSION

/s/_____
James F. Kile, Chairman

/s/_____
R.D. Maynard, Commissioner

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of June, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DARIN G MONROE
PO BOX 50313
BOISE ID 83705

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

djb _____